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IN THE

Supreme Court of the United States

October Term, 1969

No. 177

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners Oliver Rosenberg, Stephen H. Tyng, Sr., and Stephen H. Tyng, Jr., respectfully pray the Court to (1) grant rehearing of its order of October 13, 1969, denying the petition for writ of certiorari, and (2) issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit prayed for in the petition filed June 5, 1969, herein. As grounds for this petition, petitioners cite the following:

1. The subsequent inconsistent decision of the Court of Appeals and its effect on the law.

The petition for certiorari in the instant case was filed on June 5, 1969, at No. 1461, October Term, 1968 (renumbered No. 177 of the current term).

After the Court of Appeals decided the instant case on rehearing, 410 F. (2d) 177, (three judges dissenting), it decided the case of *Farrell v. Piedmont Aviation, Inc.*, 411 F. (2d) 812.

A petition for certiorari in the *Farrell* case was filed at No. 370 of this term.

Petitioners believed it inappropriate to call this Court's attention to the inconsistencies of the two decisions, and the resulting confusion in the law, while both cases were pending in this Court.

However, both petitions were denied on October 13, 1969 and petitioners now seek relief from this Court.

As reference to the petition and appendix filed with this Court in the instant case will disclose, the judgment challenged in this case is one in which the Court of Appeals has held that New York State courts may exercise jurisdiction over residents of Pennsylvania and Massachusetts, respectively, in negligence actions based on accidents which happened in Pennsylvania and Massachusetts, respectively.

In its initial opinion, 410 F. (2d) 106, the Court of Appeals sustained the action by upholding, over federal constitutional objections, the validity of a New York attachment statute interpreted in such a way as to treat a casualty insurer's obligation to defend and to indemnify the non-resident defendant as an attachable "debt" in cases where the insurer had an office in New York, even though the policies were sold and delivered outside New York and the accidents happened outside New York.

The Court of Appeals conjectured, in that original opinion, that this Court would approve a "judicially-created" New York direct-action "statute" under which the insurer would be held to be the real party in interest and a conduit whereby the New York plaintiff could reach an otherwise unreachable non-resident defendant.

When petitioners' petitions for rehearing pointed out to the Court of Appeals *en banc* that this holding was contrary to the reasoning underlying *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, and violated the individual non-resident insureds'[1] right to due process of law (the insureds being the only named defendants), the Court of Appeals held, 411 F. (2d) 117, (three judges dissenting), that the attachment, and the resultant suit, were nevertheless valid under the case of *Harris v. Balk*, 198 U.S. 215. That case involved attachment in Maryland (by a third party who found Harris in Maryland) of a fixed $180 debt due from Harris to Balk.

In both its original opinion, 410 F. (2d) 106, and its opinion *en banc* on rehearing, 410 F. (2d) 117, the Court of Appeals, over petitioners' objections, held that the insurer's "duty to defend" was property attachable in New

[1] As characterized by the majority of the Court of Appeals *en banc* at 410 F. (2d) 117-188, petitioners complained that "we did not adequately focus on the burden to a non-resident of having to defend a personal-injury action in another state, considerably far from his domicile and the place of the accident, *simply because his liability insurer has chosen to do business there*." (Emphasis added).

York and provided a basis for jurisdiction over the non-resident petitioners as defendants in suits based on out-of-state accidents. The Court of Appeals recognized that, without some property in New York to serve as a basis for an attachment, the New York courts could not obtain even *in rem* jurisdiction over the non-resident defendants who had no contact whatsoever with New York. Indeed, this was the very reason impelling New York plaintiffs to resort to the "attachment" process.

However, in *Farrell v. Piedmont Aviation, Inc.*, 411 F. (2d) 812, certiorari denied October 13, 1969, the Court of Appeals, after characterizing the action as one "by non-residents against other non-residents who have no contacts with New York, and arises out of an occurrence in another state," then said (411 F. (2d) 816):

> "In truth the defendants own nothing in New York or at least nothing that they do not 'own' to some extent in every state; their insurers are bound to defend and indemnify them wherever they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants."[2]

This was the precise point which petitioners urged on the Court of Appeals in the instant case but it was rejected by a majority of that court over a strong dissent.

The net result, now that this Court has denied

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[2] Here the Court of Appeals apparently recognized a fact that it rather blithely ignored in the instant case—that taking a defendant's property "only" to the extent of his insurance coverage is a serious deprivation of property, as indeed it is. It is merely all the protection the insured has against the potential disaster of a substantial jury verdict.

certiorari in both the instant case and the *Farrell* case, is to let stand decisions by the Court of Appeals establishing the following inconsistent rules of constitutional law:

> (1) Absent some attachable property in New York, that state cannot constitutionally exercise even *in rem* jurisdiction over a non-resident with no New York contacts, even when the plaintiff is a New York resident; and
>
> (2) The presence of the non-resident's insurer in New York does *not*, of itself, give New York constitutional power to summon the non-resident and jeopardize his insurance coverage (*Farrell* case); but
>
> (3) New York does have power to summon a non-resident insured to that state and to jeopardize his insurance coverage in a suit there—*if* the plaintiff is a resident of New York (instant case).

In other words, a non-resident's constitutional right to be free of the jurisdiction of a state with which he has no contacts, and in which he has no attachable property, depends upon the residence of the plaintiff who sues him. It *is* a denial of due process to make him answer a non-resident who sues him in a state where his insurer does business, but *not* a denial of due process if the plaintiff is also a resident there. The duty to defend *is* attachable property if the plaintiff is a resident of New York, but it is *not* attachable property if the plaintiff is *not* a resident of New York.

Petitioners submit that this new holding, making the same "duty to defend" property at one time and not property at another, with serious resultant constitutional effects, now requires review by this Court. A defendant's right to due process cannot properly be made subject to such confused and confusing rulings on federal constitutional issues.

2. The unconstitutional effect of the inconsistent rulings by the Court of Appeals.

In the instant case, the Court of Appeals held that the presence of the insurer validated the attachment and created jurisdiction over the defendant. In *Farrell*, the same court said exactly the contrary, adopting petitioners' view that:

> "defendants own nothing in New York" and added (at 411 F. (2d) 816), "where there are absolutely no New York contacts except for the doing of business by the insurer, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurer would otherwise have to settle with other claimants."[3]

Thus:

(1) Presence of a New York plaintiff does *not*, of itself, give New York jurisdiction over the non-resident defendant.[4] (Instant case, 410 F. (2d) 106 and 117); and

(2) the presence in New York of the defendant's insurer does *not*, of itself, give New York jurisdiction

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[3] In *Hanson v. Denckla*, 357 U.S. 235, 253, this Court said:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but *it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State*, thus invoking the benefits and protections of its laws." (Emphasis added).

[4] If it did, New York plaintiffs would not have to rely on the attachment of the "duty to defend" authorized by the *Seider* case and approved in the instant case by the Court of Appeals.

over the non-resident defendant (*Farrell* case, 411 F. (2d) 812, 816); but

(3) the New York plaintiff (which is not in itself enough) plus the New York insurer (which is not in itself enough) *do* add up to enough to force the non-resident to New York and to jeopardize his insurance coverage (instant case).

It is indeed a strange equation: 0 + 0 = 2. Even 0 + 0 = 1 would be a result strange enough to justify exercise of this Court's jurisdiction for the guidance of the federal District Courts in New York which are holding many cases pending this Court's final action in this case.

CONCLUSION

Petitioners submit that this Court, in its exercise of supervision over the lower federal courts, and as the ultimate guardian of the federal constitutional rights of the citizens of the states, should grant rehearing and either reverse the judgment below or remand the case to the Court of Appeals for the Second Circuit for reconsideration of this divided (6-3) decision which is utterly inconsistent not only with decisions of this Court beginning at least with *Home Ins. Co. v. Dick*, 281 U.S. 397, but also inconsistent with *Farrell v. Piedmont Aviation, Inc.*, 411 F. (2d) 812, certiorari denied October 13, 1969.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be

granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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